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ABSTRACT

This paper analyzes current court cases that address the relationships among church, state, and education, describing how government and religion have been intertwined through most of history. With the rise of democracies, however, and the recognition of abuses perpetrated by religio-government alliances, the separation of church and state became popular. This separation has now come into question with the rise of the school privatization movement and competition among schools. The increasing influence of private schools, vouchers, and individual choice has led to extensive litigation. Key cases involve the protection of privately funded religious education, the practice of religion in public schools, and the denial of religious instruction in public schools. The paper then covers current court cases in Wisconsin, Ohio, Vermont, Maine, Arizona, and other states. Often obscured by fine legalistic distinctions, the fundamental question remains whether education is for the common good or for individual good. (Contains 29 references.) (RJM)

Public Funding of Religious Schools: Legal and Political Implications of Current Court Cases

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Introduction

As this millenium comes to a close, questions as old as the millenia are raised; the relationship between church, state and education. Vital questions are at the core: Will we promote government policies which result in religious, social and economic division and strife? Can individuals be compelled to pay tax monies to support religion? Is the purpose of education to provide a common good for all or is it a market commodity which is left to atomistic consumer choice? Will control over education, public funds and governance be taken from elected school boards and turned-over to clerics? These are the questions of opponents to public payments for religious education.

Proponents ask other kinds of questions: Why are religious schools discriminated against in a time when public and other private schools receive state funding? Why should the government decide what children should be taught? Shouldn't parents be free to choose religious or non-religious instruction equally? If parents are given the money and they independently choose to pay tuition to a religious school, how can government be considered as supporting religion? Are not religious schools the very solutions to the troubles of our cities? Won't a market-economy improve education and decrease costs?

How these questions are resolved will affect the nature of democracy, concepts of individual freedoms, and roles of government. They will also determine the power and role of religious institutions. Potential government control over religious education could lead to entanglements detrimental to both church and state. These issues will influence the nature of our children's and our grandchildren's world.

The battleground is the courts. Consequently, the central focus of this paper will be on the current status of and arguments in the vital court cases across the nation. The historical precedents, however, are as old as shamans, chieftains and the ways in which tribes passed-down their rituals, beliefs and knowledges. Today's contentions must be framed in this historical context, the nature of democracy, the confluence of contemporary education privatization efforts, and U. S. Supreme Court findings that reflect and define the relationships of schools, government and religion.

Religion, Government and Education

In the long sweep of history, the concept of separating church from state is new.

It was only conceived (and perhaps required), when modern democracy was invented. For most of human time, religion has been inextricably inter-twined with government. Until the late nineteenth and twentieth centuries,

education has been the primary tool for the sustenance of the "twin swords" of religion and government.

In his letters to the Roman Christians, the Apostle Paul wrote that temporal rulers derived their powers from God and people were to "pay tribute to God's ministers." (Romans 13:1-6). In medieval and Catholic Europe, the rights of Kings were divinely devolved from God and education was to train new priests, rabbis and mullahs. Educated preists then served as government clerks and functionaries. Even then, church-state conflicts arose. In 1302, Pope Boniface VIII in *Unam Sanctum* declared the church primary over government.[2] A long series of religious wars and inquisitions, continuing today, attest to the volatility of commingling religion and government (Thut, p.107).

With fresh memories and personal experiences of religious persecution, torture, jail, fines and murder which American colonists had often escaped, the founding fathers incorporated freedom of religion (and from religion) into the First Amendment of the Constitution (Everson, 330 at 4). Thomas Jefferson, in the elementary school act of 1817, said,

> Ministers of the Gospel are excluded (from serving as visitors of the county elementary schools) . . . and with more reason than in the case of their exclusion from the legislative and executive functions. . . . No religious reading, instruction or exercise, shall be prescribed or practiced (in the elementary schools) inconsistent with the tenets of any religious sect or denomination.

But statements of principles often vary from practice. America's first education law, "Ye olde Deluder Satan Act," clearly had its basis in saving children from the devil. This 1647 Act of the Massachusetts legislature set other important precedents: (1) All children are required to be educated, (2) towns must establish schools, and (3) it is permissable and required that public funds be used to fund public education (Binder, p. 256). Despite calls for secular and universal education, early nineteenth century schools were typically religious and reserved for upper class, white males.

The universal rise of the "Common School" in the middle and late nineteenth century posited that all children should be educated for productive citizenry in a non-partisan and non-sectarian way. However, actual practice was heavily themed with protestant and conservative overtones (Kirst, pp. 26-30). It would not be until the middle and late twentieth centuries that the universal and non-sectarian calls of the founding fathers and the broad tolerance espoused by common school reformers such as Horace Mann would become a reality.

In nineteenth and early twentieth century practice, members of other religions and ethnic groups formed their own schools. Not only did they disagree with each other, they disagreed among themselves. Catholics from different nations argued as did Jews of various perspectives. All had very different religious notions as to what should be taught and what should not. Divisions by ethnoreligious groups were both reflected and sharpened by the formation and expansion of religious schools. The early twentieth century

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[2] In thereby seeking to depose Philip IV of France, Boniface was kidnapped, tortured and subsequently died in 1303.

ascendancy of progressive education philosophy, tempered by the external demands of the first World War, brought the need for common values and common schools to the fore (Cremin, p. 115, *et seq*).

Cremin's ever-moving kaleidoscope (rather than melting pot) remains. Ethnocentric and related religious affiliations persist -- in jarring juxtaposition with all of us being Americans. Arthur Schlesinger in his 1992 book, "The Disuniting of America," pleas that the whole point of America was to build a new culture with values commonly shared by all. He fears fragmentation by religious and ethnic groups and that the schools will be the battleground. In Schlesinger's view, the question is essential to the preservation of the nation. He concludes his essay with the question of how do we restore the "unum" in a nation focused on "pluribus" (Schlesinger, 1992).

The Rise of the School Privatization Political Movement

The "Common School" notion had great popular acceptance throughout the last half of the nineteenth and throughout the twentieth century. The incremental realization of truly universal education was credited for forming the greatest economic, industrial and military power of the world. John Kenneth Galbraith credits the success of this universal system as the single most important difference between highly developed and under-developed nations (Galbraith, 1967). However, although the ideal was embraced, the quality of common schools varied by color, gender and wealth throughout the twentieth century.

From an economic and social philosophy perspective markedly different from Galbraith's, Milton Friedman, posited that the education "monopoly" would be improved by free-market competition. Each parent would get a voucher which they could combine with their own monies and the child could attend whatever school they wanted (Lowe, 1995). The idea did not immediately catch-on and traditional private schools (religious, military, preparatory, etc.) continued to garner about ten percent of the school population. Under this guise, "Academies" were formed in some Southern states to avoid integration.

Privatization did not begin to build political momentum until 1983 when, "A Nation at Risk" was published. This critique of American education portrayed the nation as in an economic war with the world and painted a dire picture of our imminent economic and social demise[3]. Conservative reformers seized on the notion of vouchers as the simple and complete reform movement. The key work was Chubb and Moe's 1990 book, "Politics, Markets and America's Schools."

This new interpretation of conservative philosophy reduced democracy to consumption practices -- and found disparate political allies. Business interests, captured by a market-model view of society and anxious about foreign competitors called for high standards and workforce preparation. School competition was the way to bring it about. Religious fundamentalists, separatists and conservatives saw a way to economically enhance and

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[3]Contemporary observers have noted that the predicted economic catastrophe has not been born out by the soaring 1999 stock market, the economic position of the United States vis-a-vis other nations, unemployment and other indicators

advance their interests. Libertarians and people who mistrusted government found a path to partially divest themselves of government . Elitests who feared or did not desire to have their children attend schools with lower socioeconomic children saw a government subsidized escape hatch. A new professional middle class with personal interests in the new order also became an ally in the cause (Apple, 1998; Whitty, *et. al.*, 1998).

With initial success, proponents of religious tuition appealed to people of color and low-income constituiencies in the inner cities of Milwaukee and Cleveland to support sectarian tuition. They portrayed religious schools as a safe, effective alternative to what they viewed as the dangerous failure of inner-city public schools. In the eyes of opponents, however, the victims were being recruited to hasten the demise of the interests of their own children and of poor people of color. Critics claimed that such solutions actually increased religious, social and economic disparities (Lowe, 1996; Van Dunk, 1998).

These political alliances supported sympathetic and companion initiatives such as public school choice schemes, magnet schools, charter schools and home-schooling. When taken together, these groups and programs formed a substantial hegemenic political block.

Voucher proponents made considerable political progress by claiming that achievement is poor and the "educational establishment" blocks progress -- despite considerable evidence to the contrary. Administrators and unions are portrayed as controlling schools against the wishes of parents and citizens. Advocates say that market forces would improve the schools, save money, encourage innovation and result in higher parental satisfaction (Koliba, 1998).

After thirty years of research in the United States and a number of other countries, the consensus of independent researchers shows

- little or no academic improvement through voucher schemes (Metcalf, 1998; Lee, 1996; Levin, 1998; Cookson, 1995),
- social classes are driven further apart (Carnoy, 1995; Ambler, 1994; Williams, 1992), and
- costs are increased as a result of public subsidies of privatized schools (Levin, 1998; Murray, 1999; Alexander, 1998).

Little evidence of direct or indirect improvements have been found from applying the market dynamic to education and such an application to education is viewed by many authors as an inappropriate model to carry out the aims of universal education (Van Dunk,1998; Jimerson, 1997; Boorstein, 1997; Carnegie Commission, 1992; Henig, 1994).

Nevertheless, the notions of individual choice, ethno-religious primacy for school curriculum and organization, privatization efforts, and appeals to market-models have had a strong impact in statehouses and courthouses.

Public Schools and Religion: Court Antecedents

It is hardly surprising that this potent mix of economic interests, religious views, cultural and ethnic issues would end up in litigation. Redefinitions of

democracy, government, common good and individual good were put before the courts.

There are key court decisions across the century:

Privately funded religious education is protected - *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

By the early 1920s (and at a high point for the progressive education movement and the common school), the State of Oregon enacted a law saying that all children must attend public schools. In *Pierce*, the U. S. Supreme Court found that people were free to form, operate and attend religious schools without interference. This decision basically confirmed the practice of the first 150 years of the republic. Analysis of this decision, however, raised the question as to whether such religious freedom is available to those who cannot afford it (Kirp and Yudof, p. 86). While ignored by Friedman, the question was to echo, seventy years later, on both sides of the arguments.

Transportation reimbursement allowed to all schools - *Everson v. Ewing Board of Education, 330 U. S. 1 (1947).*

This was the first case on funding and religious schools to be decided by the U. S. Supreme Court. The town of Ewing, New Jersey paid public bus fare for students to attend both public and Catholic schools. This practice was challenged as supporting religion. In clear language, justices voting both for and against this transportation reimbursement spoke about the dire evils of government support of religion and the imperative need to avoid such complications.

Contemporary debaters contend that the Constitution says nothing about "a wall of separation between church and state." This statement of Thomas' Jefferson's was read into the opinion (330 U. S. at 5) and was found by the Court to represent the intent of the First Amendment. However, in affirming bus fare for all children, the Court reiterated the principle that government actions which were neutral or applied evenly to all cases were not a violation of church and state separation. The concepts of neutrality and indirect (or attenuated) support presented in this opinion proved to be the center of later controversies.

Practice of Religion in Public Schools - As earlier noted, separation of church and the schools was the dominant set of beliefs. Nevertheless, the practice of public schools was often protestant through the first half of the twentieth century. This practice was challenged.

•Religious Instruction Denied in Public Schools - *McCollum v. Board of Education, 333 U. S. 203 (1948).*

In denying religious classes in public schools, Justice Felix Frankfurter said public schools are the "symbol of our democracy and the most pervasive means for promoting our common destiny." The schools are "perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people." If *Everson* was a crack in the wall of separation, the notion of the common good and non-secular use of education tax monies was still prominent in the interpretation of the court.

•Group prayers proscribed - *Engel v. Vitale, 370 U.S. 421 (1962).* The New York Board of Regents "recommended" a prayer to be said in schools. The U. S. Supreme Court found that this was coercive participation in a religious practice and declared it unconstitutional.

• Bible reading denied - *Abingdon School District v. Schempp, 374 U. S. 203 (1963).* The state law to start each school day with a reading from the bible is struck down. While the students were not coerced to practice religion in the schools, the effect of a government sanctioned religious practice on impressionable young minds was found to be violative of the First Amendment.

Although similar cases with varying circumstances followed, direct religious indoctrination and observances were denied. Later cases began to parse fine differences. Public prayers in adult muncipal and legislative bodies passed Constitutional muster while those seen to be imposed on youth were denied. However, these earlier cases advanced the notion of government neutrality and indirectness of payment as tests for allowable government action.

Criteria for Church-State Separation Established: Lemon v Kurtzman, 403 U. S. 602 (1971) - As direct as these cited cases appear, reality was far more confused. In 1971, the U. S. Supreme addressed the "blurred, indistinct and variable barrier" (403 U.S. at 614). They established a three-point summary of previous decisions and established these as "criteria developed by the court over many years" (403 U.S. at 612). These principles became known as the Lemon test:

(1) Does the law have a secular legislative purpose?
(2) Is its principal or primary effect one that neither advances nor inhibits religion?
(3) Does it foster excessive entanglement with religion?

The Court said that government could not "further any of the evils" which were sponsorship, financial support, or active involvement in religious activity.

Government Reimbursements and Tax Deductions - *Committee for Public Education and Religious Liberty v. Nyquist, 413 U. S. 756 (1973).*

But things were not to stay in place very long. New York state passed a law giving health and safety facilities grants to non-public schools -- of which 85% were Roman Catholic. Poor parents could receive a per pupil tuition reimbursement grant for these purposes. Parents who failed to qualify for tuition reimbursement were eligible for tax relief. In *Nyquist*, the Supreme Court ruled that these payments were unconstitutional as they had the impermissable effect of advancing religion.

In *Meuller v Allen, 463 U. S. 388,(1983)*, the Court appeared to dramatically reverse itself when it approved state tax deductions for private and public "tuition, textbooks and transportation." In this 5-4 decision taken ten years after *Nyquist*, the court concluded that the deductions met the three-part Lemon test. (1) The deductions were considered to have a secular purpose in that they were available to both private and public school parents. (2) Since the

government was not directly sending money to religious institutions, the effect was attenuated and thus, neutral in neither advancing nor inhibiting religion. (3) Allowing the parents to make the deductions was seen as providing a protection against excessive entanglement.

When objection was made that public school parents did not have large tuition bills to deduct from their taxes and the deduction therefore, in practice, overwhelmingly advantaged religious schools, the court said, "We need not consider these contentions in detail."

While *Nyquist's* tax relief may seem a lot like *Meuller's* tax deduction, The *Meuller* court goes to some pains to point out the difference; tax deductions were available to both public and nonpublic school parents, and public money was not going directly into religious school coffers. Finer distinctions were increasingly being drawn.

Special Needs Services- At the same time that tuition payments, deductions and direct religious observances were being argued; a separate strand of cases surrounding special services for handicapped and needy children was working its way through the courts.

• Compensatory Education Services - *Aguilar v. Felton, 473 U. S. 402 (1985).*

On behalf of economically and socially deprived parochial students, plaintiffs contended these students were entitled to federal Title I services on the same basis as public school students. The Court allowed services for sectarian students but barred these public services from being provided on religious property. Thus, an entitlement to special non-sectarian remedial programs was established. The use of off-premises facilities prevented excessiv entanglement, the law's purpose was secular, and the compensatory programs were considered neutral as regards religion.

• Location of Compensatory Education Services - *Agostini v Felton (1997).*

Claiming that these off-site premises in mobile classrooms and rental space were posing an economic burden as well as inconveniences to students and Title I faculty and staff, the federal Department of Education along with the major teachers' unions argued that the sanction against instruction on religious school property was too restrictive. The Court agreed on a 5-4 vote.

While some argue that this decision leaves the question of religious tuition for another day, critics of the decision worry that a gratuitous essay in the opinion on indirect payment through parent choice was improper "agenda setting" by the Court. Critics also contend that the decision effectively erases the "excessive entanglement" test of the Lemon decision.

• Special Education Services - *Zobrest v. Catalina Foothills School District, 509 U.S. 1(1993).*

The Court allowed an on-site sign language interpreter for a deaf student attending a Roman Catholic high school. This was considered a special education required service.

• Use of Educational Entitlements for Religious Education - *Witters v. Washington Department of Services for the Blind, 474 U. S. 481 (1986).*

In this case, rehabilitative services money was used for seminary training. The Court ruled that once the individual received the rehabilitative money from the state, then the Court could not tell him how it was to be spent. The case is significant as it supports indirect payments which are seen as governmentally neutral under these circumstances.

Co-Curricular Support - *Rosenburger v. University of Virginia, 515 U. S. 819 (1995)*

A student religious publication was not allowed student activities funds like other and non-religious student publications. The plaintiff contended that his free speech was being abridged solely on the basis of religion. Applying the concept of open public forum, he won on the basis of free speech.

At an increasing pace, court cases pressing for public subsidy of sectarian education have made their way through the courts. Although not subjected to litigation, G. I. Bill federal grants to students have long been used at religious colleges. Special education and compensatory services are clearly allowed but co-curricular support appears isolated or situational.Unfortunately, the tangle of cases involving indirect payments through parents, tax credits, government reimbursements and finer definitions and redefinitions do not provide the clarity sought by the Lemon test.

It is against this backdrop that the shifting balance between education, political forces and religion is to be decided in the currently active cases. At the heart of the matter is whether education is a common good or whether government is to subsidize individual and sectarian causes. The debate is fueled by a confluence of pro-voucher political forces seeking to privatize education. U. S. Supreme Court Decisions have addressed a large number of ancillary issues but the high court is yet to say whether direct tuition subsidies to religious schools (such as in Nyquist) and the tests for separation of church and state (Lemon test) are still considered to be good law.

Current Court Cases

Recent cases have raised the public funding question in a more direct and pristine form. Litigation has substantially increased in recent years following the enactment and revision of school choice and voucher programs in a number of states. In these cases, the courts eventually will be unable to avoid answering the ultimate questions on the constitutionality of vouchers to religious schools. To a large extent, these cases form part of a nationwide strategy on both sides of the issue with each camp attempting to move the case with the most favorable set of facts and circumstances to the United States Supreme Court, hoping to establish a favorable national precedent. Each case, and each state, presents its own unique legal and factual picture, including significant questions under the respective state constitutions. Each case also has its own procedural history and is influenced by the various personalities that have been brought to bear in each conflict. The following capsules set forth in summary

form the history, procedural posture, and issues raised in the most significant recent and ongoing cases.

Wisconsin

In an effort to revitalize Milwaukee's ailing public schools, the Wisconsin Legislature in 1995 enacted amendments to an existing parental choice program in the City of Milwaukee. Under the amended program, a certain number of students from low income families may elect to attend at state expense any private school, including any private sectarian school, that chooses to participate in the program. For each student attending a private school pursuant to the program, the state would pay directly to the participating private school an amount equal to the state aid that otherwise would have been paid to the Milwaukee Public Schools, and the private school would not be permitted to charge additional tuition. By opening the program to sectarian schools in 1995, 89 religious schools, enrolling approximately 84% of all Milwaukee private school students, chose to participate in the program. Because the program does not limit the state aid payment to actual tuition charged, the state will pay most of the participating sectarian schools more per pupil than those schools would otherwise charge in tuition.

A week after broadening the program to include religious schools, two law suits were filed by various parents, taxpayers, teachers, members of the clergy and certain organizations that represent individual plaintiffs. Another group of plaintiffs including the National Association for the Advancement of Colored People ("NAACP") subsequently filed a separate law suit. In addition to advancing several claims under the Wisconsin Constitution, each of the three suits sought to have the amended choice program struck down as violative of the Establishment Clause of the First Amendment to the United States Constitution. The three lawsuits were consolidated, and two groups of parents and associated organizations, including Parents for School Choice, were permitted to intervene on the side of the defendants. After plaintiffs in the first two lawsuits moved for a preliminary injunction, the Wisconsin Supreme Court, on petition of Governor Tommy G. Thompson, assumed original jurisdiction of the matter and stayed further proceedings in the trial court. The Wisconsin Supreme Court preliminarily enjoined the implementation of the new program and all parties agreed to a stipulated factual record. Following briefing and argument, one justice of the court recused herself, leaving the court equally divided. The court sent the case back to the trial level, keeping the preliminary injunction in place.

The parties then filed cross-motions for summary judgment in the trial court, again arguing the constitutionality of the amended choice program under both the United States and Wisconsin Constitutions. The trial court ruled on January 15, 1997 that the program was unconstitutional under several provisions of the Wisconsin Constitution, including its religion clause. Having struck down the program on state constitutional grounds, the trial court did not address whether the program violated the federal constitution. On August 22, 1997, the Wisconsin Court of Appeals, an intermediate appellate court, affirmed the trial court's decision, with one judge dissenting. The Court of Appeals similarly decided the case under the Wisconsin State Constitution, finding it

unnecessary to decide the Establishment Clause issue. In construing the state constitution's religion clause the court believed it appropriate to consult relevant United States Supreme Court cases, in particular the *Nyquist* case. The court felt the programs struck down in *Nyquist* closely paralleled the Milwaukee choice program. The State of Wisconsin and the intervenor-defendants appealed to the Wisconsin Supreme Court. On June 10, 1998, the court reversed, upholding the amended Milwaukee choice program against all challenges by a vote of 4 to 2.

Addressing the constitutionality of the Milwaukee program under the Establishment Clause, the Wisconsin Supreme Court surveyed United States Supreme Court precedent and determined that those cases rest on what it termed the principles of "neutrality and indirection". The court explained its position as follows:

> [S]tate educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and non-sectarian institutions (1) on the basis of neutral, secular criteria that neither favor or disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children. The amended [choice program] is precisely such a program.
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> *Jackson v. Benson, 578 N.W. 2d 602 (1998).*

There is no appeal of right to the United States Supreme Court. Plaintiffs requested that the high court hear the case and reverse the Wisconsin Supreme Court, arguing that its decision was directly contrary to Nyquist. Plaintiffs saw the Wisconsin case as providing a pure vehicle to the Supreme Court in which it could either reaffirm--or overrule--*Nyquist* and remove the "constitutional cloud" enveloping the argument over similar voucher programs across the country. Counsel for the Plaintiffs, including the American Civil Liberties Union, the Wisconsin Federation of Teachers, Americans United for Separation of Church and State, and others, suggested that the Wisconsin case as compared with other pending cases presented the issues in the most "direct and pristine" form. Imploring the Court to settle the unresolved questions over the constitutionality of voucher programs, petitioners asked the court to help avoid a "needless, divisive debate between supporters of sectarian education and supporters of public education." If *Nyquist* is no longer good law, the petitioners asked the court to overrule the case "so that those who oppose the use of public funds to pay for religious education will be required to make their case solely on the basis of education policy, and not rely on a precedent of this court that no longer is good law." (Petition for certiorari at 21-22).

Perhaps preferring to first see the decisions in other pending cases, the United States Supreme Court denied review on November 9, 1998. The denial of review sets no precedent, and cannot be cited as an endorsement of the Wisconsin Supreme Court's reasoning. It does, however, allow the Milwaukee choice program to operate until and unless the Supreme Court reviews the matter in another case.

Ohio

The Ohio case raises issues most similar to those raised in Wisconsin. The Ohio pilot scholarship program was enacted in response to an educational and fiscal crisis in the Cleveland City School District so severe that on March 3, 1995, the United States District Court for the Northern District of Ohio ordered the state to take over the administration of the district. In response, the pilot program instructs the state superintendent to create a number of programs providing financial and other assistance to students in the Cleveland City School District. Only the scholarship program enabling students to attend "alternative schools" has been challenged as unconstitutional. Under the program, scholarship recipients chosen by lot receive a fixed percentage of the tuition charged by the alternative school of their choice, up to a maximum of $2,500. Private schools located within the geographic boundaries of the Cleveland City School District, as well as public school districts adjacent to the city are eligible to participate as "alternative schools". The amount of the scholarship paid is to some extent pegged to a student's family income.

Receipt of scholarship money is accomplished in one of two ways. Where a scholarship recipient has chosen to attend a private school, the state delivers a check, made payable to the recipient's parents, to the chosen school. The parents must then endorse the check over to the school. In the case of an adjacent public school, the state issues a check directly to the school.

In the 1996 - 1997 school year, approximately 2000 scholarships were awarded. Because all of these scholarships were awarded to low income students, all recipients received the maximum amount allowed by law. Fifty-three private schools registered to participate in the scholarship program for the 1996-1997 school year. Approximately 80% of these schools were sectarian in nature. The trial court found that while the precise percentage of sectarian schools participating might change over time, the majority of the scholarships will be used to fund students attending sectarian schools. No adjacent public school districts chose to participate in the program for the 1996-1997 school year.

The Ohio case involves two consolidated lawsuits. The first, filed January 10, 1996 by taxpayers, seeks to prevent implementation of the scholarship program on the grounds that it violates the Establishment Clause of the United States Constitution as well as several provisions of the Ohio Constitution. A second taxpayer lawsuit was filed on January 31, 1996 also challenging the scholarship program on constitutional grounds. The two lawsuits were consolidated, with the trial court also permitting two groups to intervene in support of the scholarship program. These intervenors consist of parents, a number of private schools registered to participate in the program, and two organizations formed to open private schools to participate in the scholarship program.

All of the parties filed motions for summary judgment. Following briefing and argument, the trial court issued a decision on July 31, 1996 finding the scholarship program constitutional. Characterizing the program as providing indirect and attenuated aid (rather than direct aid) to sectarian education, the trial court determined that the plaintiffs had not "established beyond a

reasonable doubt" that the scholarship program violated the Establishment Clause. The trial court found that the Ohio Constitution provided no greater level of protection.

Plaintiffs appealed this decision to the Ohio Court of Appeals, an intermediate appellate court, which in an unanimous decision reversed the trial court on May 1, 1997. Following an extensive discussion of United States Supreme Court precedent, the court wrote:

> Because the scholarship program provides direct and substantial, non-neutral government aid to sectarian schools we hold that it has the primary effect of advancing religion in violation of the Establishment Clause. (*Simmons-Haris v. Goff*, No. 96 APE 08-991 (May 1, 1997) at 21.)

The Ohio Court of Appeals went on to analyze the case under the Ohio Constitution, finding similarly that the scholarship program violated Ohio law. The court determined that the Ohio "school funds clause" was intended to provide greater, or at least different, protections than the Establishment Clause of the First Amendment, as it spoke specifically to the use of state funds by religious groups. Accordingly, the court provided an independent basis for striking down the scholarship program in the State constitution.

Defendants have appealed the Ohio Court of Appeals' decision to the Ohio Supreme Court. The matter has been briefed and was argued in October, 1998, but no decision has yet been issued.

Vermont

The Vermont case arises from a unique feature of Vermont's school law. Small school districts that do not operate secondary schools are allowed by statute to tuition students to any public or private school of their choice. A 1961 decision of the Vermont Supreme Court restricted the program to non-sectarian schools. Nonetheless, under this program many small, mostly rural, districts in Vermont have had substantial public and non-sectarian school choice since 1869. In May, 1996, the school board in the small green mountain town of Chittenden authorized the use of public funds to pay tuition for Chittenden pupils to attend Mount Saint Joseph Academy, a pervasively sectarian high school owned and operated by a Roman Catholic Order. The Chittenden Board solicited a legal opinion advising them that developments in the law and recent constitutional interpretations allowed the inclusion of religious schools. The Vermont statute requires that the school district pay all tuition directly to the school. No express provision is made in Vermont law to ensure that public funds are not used for religious or sectarian purposes.

Concluding that this use of public funds would violate both the Vermont Constitution and the Establishment Clause of the First Amendment, the Vermont State Department of Education withdrew state education funding from the Chittenden Town School District, and the district sued to recover its aid. The school district hired the Institute for Justice, also involved in the Ohio and Wisconsin cases, to represent them.

The trial court allowed two groups of individuals to intervene. The first, a group of taxpayers opposed to the district's use of their tax monies to fund sectarian education, intervened on the side of the State, seeking a declaratory judgment that the district's plan was unconstitutional. The second group included parents and students who had chosen to attend the Catholic school, who urged the court to uphold the program, and argued in addition that the Free Exercise Clause of the First Amendment required that religious schools be included in the mix of choice allowed in tuitioning districts.

The trial court requested that the parties engage in discovery with the ultimate goal of submitting the case on a stipulated record with summary judgment motions. Discovery revealed that Mount St. Joseph Academy truly was a pervasively sectarian school, as that term had been used in Supreme Court jurisprudence. The school proudly stood by its philosophy to intertwine religious and secular instruction such that it would be impossible to separate these financially or otherwise. The school district and the parent intervenors argued, for their part, that the tuitioning statute in question had existed for over a century and thus was clearly not intended to provide a benefit to religious instruction. Further, they argued that the statute was completely neutral on its face with no money flowing to any religious school except on the basis of independent choices made by students and parents. The parent intervenors argued that a decision against them would discriminate against religion in violation of the Free Exercise Clause and the principles of neutrality.

The State and taxpayer intervenors argued primarily that the direct, unrestricted payment of state and local tax dollars to a pervasively sectarian institution had the necessary effect of supporting or advancing the religious mission of the school. The taxpayers argued, as well, that the payments violated the Vermont Constitution's prohibition against compelling taxpayers to support religious institutions.

In a 48-page decision dated June 27, 1997, the trial court sided with the State Department of Education and the taxpayer intervenors. The court first addressed the Vermont Constitution, finding that the "protections granted by the Vermont Constitution are at least co-extensive with, rather than more prohibitive than, the Federal Constitution." The court noted that the taxpayer intervenors had made "an attractive argument" that the Vermont Constitution is more prohibitive than the federal constitution, in that it textually prohibited the compelled support of religion in language far more specific than the Establishment Clause of the First Amendment. The court nonetheless read these provisions as embodying the same essential values of government non-involvement. Accordingly, the trial court's ruling was primarily grounded in federal law. The court analyzed Chittenden's tuitioning decision under the well known "Lemon test", based on *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Addressing the "primary effect" prong of the Lemon test, the court concluded that "there can be no doubt that a tuition payment from the Chittenden Town School District to Mount St. Joseph Academy would have the effect of a direct subsidy to the religious school". The court rejected the District's argument that this result was attenuated because the funds would only go to the school if parents chose to send their children there. Citing *Nyquist*, the court concluded that the role of parental choice is but one relevant factor in determining the effect of a particular program or policy.

The trial court noted that there have recently been an increasing number of exceptions to the general rule prohibiting funds from aiding pervasively sectarian schools, but the court determined that "the exceptions have not yet swallowed the rule, and in the end, are unlikely to do so." Here, the court viewed the case as involving the implementation of a school district policy to allow this sectarian school, and other religious schools, to look to public monies to fund their general operating budget on a continuing basis.

The trial court also felt that the school board's action violated the "excessive entanglement" prong of the Lemon test. Looking at statewide statistical evidence, the court determined that if Chittenden were allowed to make tuition payments to sectarian schools, other tuitioning districts around the state would be allowed to do the same. Over time, administrative entanglement between religion and the state would be inevitable. Each year, taxpayers in these towns are almost certain to inquire as to where their tax dollars are being spent and for what purpose. In order to answer these questions school boards would have to engage in some level of continuing administrative review of religious schools' budgets and activities. The court concluded:

> Based on the facts in the present case the only plausible conclusion we can reach is that even if allowing Chittenden to tuition its students to Mount Saint Joseph Academy does not have the immediate effect of creating political divisiveness and entanglement, such entanglement will rapidly develop . . . .[M]ore and more parents in tuitioning school districts throughout the state would ask their school boards to tuition their children to pervasively sectarian schools. Inevitably, pervasively sectarian schools would begin to look to public funds as a potential source of funding their institutions. New sectarian schools of all kinds, perhaps on the fringes of the religious main stream, seeing the potential for public financial support, would open their doors. Then, schools like Mount Saint Joseph Academy, whose tuition is significantly less than the cost of educating a child, could increase their tuition to better cover the cost of education and other institutional expenses. Pervasively sectarian schools would have an incentive to increase their revenues by recruiting students from tuitioning school districts to attend their institutions. As a result, an increasing number of pervasively sectarian schools will be competing for an increasing amount of public funds on a continuing basis. . . . Additionally, as tuitioning towns begin to send tuition payments to pervasively sectarian schools, debates over the school budget will intensify and divide along religious lines. (Opinion and Order, Docket No. S0478-96RcC, Rutland Superior Court, June 27, 1997 at 40-41).

The school district and parent intervenors appealed the case to the Vermont Supreme Court, as Vermont has no intermediate appellate level court. The matter was briefed and argued at a special session of the Vermont court held at Vermont Law School on March 10, 1998. The decision is still pending. In an interesting political twist, the makeup of the Chittenden Town School Board had changed, with a majority of the Board now opposed to paying tuition

to sectarian schools. The case is not moot, however, given the parent intervenors involved.

Maine

The Maine cases are the inverse of the Vermont case. Maine, like Vermont, has a tuition system allowing small school districts that do not operate high schools to tuition students to other districts. Maine state law, unlike Vermont's, specifically prohibits tuitioning any student to a sectarian school. This has prompted two separate cases brought by parents of students attending sectarian schools seeking to obtain public tuition dollars.

In the first of these actions, brought in Federal Court, the plaintiffs live in the Town of Minot. The parents have chosen to send their children to St. Dominic's Regional High School, a private Catholic sectarian school. After unsuccessfully seeking reimbursement for tuition paid to St. Dominic's in the fall of 1996, Plaintiffs sued the Maine Commissioner of Education, asserting that the State tuitioning statute is unconstitutional because it precludes payments to sectarian schools. Given no dispute over the facts, the United States District Court for the District of Maine heard the matter on cross-motions for summary judgment. In a short 4-page opinion, Judge D. Brock Hornby concluded that the Maine tuitioning statute was constitutional as written. The court limited its consideration to the specific issue raised in the case: whether payments to sectarian schools were constitutionally required. The court left open the issue raised in the Vermont case, that is, whether such payments would be constitutionally permitted:

> Whether Maine might permit its school districts ultimately to choose to provide such options and whether the practice would be constitutional is a case for another day. I decide today only whether Maine is constitutionally required to extend subsidies to sectarian schools. I find no authority for such a requirement.

The court acknowledged that the plaintiffs were certainly free to send their children to a sectarian school, and that that right was protected by the Constitution, citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The court concluded that "the law is clear, however, that they do not have the right to require taxpayers to subsidize that choice". *Strout v. Commissioner*, no. 97-259-P-M (D. Me. Aug. 11, 1998).

The District Court's decision has been appealed to the United States Court of Appeals for the First Circuit, located in Boston, which hears appeals from the federal courts in Maine, New Hampshire, Massachusetts and Rhode Island. The matter has been briefed and was argued in early 1999, but no decision has been issued.

In the parallel Maine case, a group of parents living in Raymond, Maine filed suit seeking to send their children to the Cheverus High School in Portland, Maine, a pervasively sectarian Catholic school operated by the Society of Jesus. Like Minot, Raymond has no public secondary school, and thus provides secondary education through the Maine tuition program. The trial court found that the plaintiffs had not established a violation of their free

exercise rights, as they had not shown that sending their children to the Catholic school was a central religious belief or that the state's failure to pay for such education had substantially burdened the Plaintiff's religious beliefs or practices. The court specifically held that the Maine tuitioning statute did not discriminate against religion, as the plaintiffs were free to send their children to Cheverus, but not at taxpayer expense.

Plaintiffs in the state court action also argued Maine's statutory exclusion of payments to sectarian schools violated the Establishment Clause, as such exclusion is not neutral to religion. Viewing the case from the perspective of the Lemon test, plaintiffs' argument was that the primary effect of the statute would be to "hinder" religion in violation of Lemon. The court determined, however, that changing the statute to provide for tuition payments to sectarian schools would itself violate the Establishment Clause because the effect would be subsidize and advance religion. The court cited Nyquist for this proposition.

The state court case has also been appealed. Having no intermediate appellate court, the matter is now pending before the Maine Supreme Judicial Court. The case was argued in November, 1998, but no decision has yet been issued.

Arizona

The Arizona Legislature enacted a tax credit statute, which allows, beginning with the 1997 tax year, a state tax credit of up to $500 for those who donate to certain "school tuition organizations". A school tuition organization is a charitable organization exempt from federal taxation that allocates at least 90% of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parent's choice. A qualified school is defined to mean any nongovernmental primary or secondary school that does not discriminate on the basis of race, color, sex, handicap, familial status or national origin. Presumably religious exclusion is allowed. Plaintiffs challenged the tax statute in an original action before the Arizona Supreme Court as unconstitutional under both the Establishment Clause of the First Amendment and the Arizona State Constitution. Plaintiffs argued that the tax credit failed the Lemon test because it would have the primary effect of encouraging and funding sectarian education.

The court upheld the tax credit statute, relying primarily on *Meuller v. Allen*, 463 U.S. 388 (1983). *Meuller* upheld a Minnesota income tax deduction for educational expenses, including those incurred at sectarian schools. One of the bases of the *Meuller* decision was that tax deduction, unlike a credit, did not result in a dollar-for-dollar transfer to a sectarian institution. The Arizona court was unimpressed with this distinction, however, failing to see any constitutionally significant difference between a tax deduction and tax credit:

> It is true of course that there are mechanical differences between deductions and credits. The former are subtracted from gross income, reducing the net amount of a tax which is assessed according to the taxpayer's marginal rate, while the latter are taken directly from the tax as tentatively calculated. . . . We do not believe, however, that such distinctions are constitutionally significant. Though amounts may vary,

> both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce "socially beneficial behavior" by taxpayers. *Kotterman v. Killian*, Dkt. No. CV-97-0412 SA (Ariz Jan. 26, 1999) at ¶12.

Applying the *Lemon* test, the court determined that the tax credit had a secular purpose in assuring the continued financial health of private schools, be they sectarian or non-sectarian. Next, the court found that the principal effect of the tax credit was not to advance religion. In reviewing the issue, the court determined that the tax credit was one of many available credits and deductions and noted that great deference is given to the legislature's creation of the classifications and distinctions in tax statutes. The court also determined that the Arizona tax credit was available to a broad class of recipients, not just the parents of religious school children. Any individual, not just a parent, may donate to the scholarship program. Further, any funds which reached sectarian schools would do so as a result of "numerous, private choices" in contrast to direct state financial aid. Citing to the recent Wisconsin decision, the court determined that the tax credit scheme provided for multiple layers of private choice, concluding that the schools were no more than indirect recipients of taxpayer contributions. A parent's decisionmaking process was completely devoid of state intervention or direction, protecting against the government "sponsorship, financial support, and active involvement that so concerned the framers of the Establishment Clause". As such, the court felt that no reasonable observer could conclude that the state was endorsing a religious practice or belief through the enactment or operation of the tax credit.

In this 3-2 decision upholding the constitutionality of the tax credit, the dissent argued that the options offered to taxpayers were really a sham, because "there is no real choice--one may contribute up to $500 to support private schools or pay the same amount to the Arizona Department of Revenue." The majority's response to this was as follows:

> [The dissent] assumes that maximum tax avoidance is the inescapable motive of taxpayers in every decision they make. We know, however, that people frequently donate to causes or organizations offering limited or no tax benefits. Moreover, while it seems a part of human nature to bemoan taxes, their importance to society is generally recognized. This tax credit may provide incentive to donate, but there is no arm twisting here. Those who do not wish to support the school tuition program are not obligated to do so. They are free to take advantage of a variety of other tax benefits, or none at all. *Kotterman*, ¶21.

Reviewing the Arizona State Constitution, the court found that the tax credit was not violative of provisions prohibiting public money from being paid to religious institutions. Under the tax credit program, no "public money" would go to a sectarian school. Rather, the state would merely collect less taxes. The court rejected the Plaintiff's argument that because taxpayer money could have entered the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts ownership over it.

The Arizona decision was issued on January 26, 1999. The plaintiffs decided not to seek review in the United States Supreme Court.

Other States

Two other cases bear mention. In Pennsylvania, a local school district determined, on its own, that it would establish a voucher program. The program provided scholarships for students residing within the Southeast Delco School District to choose to attend any other public or private school. Taxpayer plaintiffs brought suit claiming, among other things, that the local school district had no statutory authority to establish a voucher program on its own. The trial court agreed, finding no statutory authority for the program. Although plaintiffs raised Establishment Clause issues, these were not considered by the court. The trial court's decision has been appealed and a decision is pending. If the appellate court finds that the district was statutorily authorized to establish the program, it will then need to consider the Establishment Clause ramifications of the plan.

Finally, a recent case arising in federal court in Louisiana parses the tangled web of precedent involving aid to special education programs occurring in parochial schools. The United Stated Court of Appeals for the Fifth Circuit, first noting that "this is an area of constitutional law that is not blessed with easy answers", upheld portions of a program under which public funds were used to pay special educators teaching on sectarian school premises, but found unconstitutional other portions of the program providing for supplies and materials. The decision is notable for its detailed analysis of the latest Supreme Court pronouncement on these issues, *Agostini v. Felton*, 117 S.Ct. 1997 (1997). As the court concluded:

> When we view the deceptively simple words of the Establishment Clause through the prism of the Supreme Court cases interpreting them, the view is not crystal clear. Indeed when the Supreme Court itself admits that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," as a circuit court bound by the High Court's commandments we must proceed in fear and trembling. (*Helms v. Picard,* No. 97-30231 (5th Cir. Sept. 3, 1998).

Fear and Trembling: Do Clear Rules Emerge?

Given the difficulty the courts have had grappling with these issues for the last fifty years, it would be presumptuous to attempt to posit a synthesis, a "unifying theory" of the universe of establishment clause jurisprudence in the area of the schools. Several general themes emerge, with legal questions arising that cannot be answered simply by reference to legal precedent. The morass of precedent -- where even the United States Supreme Court can only "dimly perceive" the answers -- has, it may be argued, greatly benefited the proponents of school choice and various public funding schemes. The reason is that it is far simpler to construct a jurisprudence around the themes of neutrality and direction, as adopted by the Wisconsin Supreme Court, than to

grapple with and draw the fine lines necessary in the messy, real world.

The themes, or subjects, of the debate include at a minimum the following: (1) how much and what kind of emphasis should be placed on government neutrality regarding religion, non-religion, and different religions?; (2) to what degree is indirect payments through parents, or attenuation important?; (3) to what extent does the effect of the program, neither to advance or inhibit religion -- the middle prong of the *Lemon* test -- matter?; and (4) from whose perspective and at what point in time, do we apply the test? Do we look at it from the parent's point of view? From the taxpayer's? From the school's? Or from society's as a whole?

Neutrality - Surely neutrality is a necessary condition to be placed on any government aid or funding of sectarian education. But no court has yet found neutrality alone to be a sufficient condition. Even the Wisconsin Supreme Court added the talisman of "indirection," meaning in that case that private individuals, not government entities, must direct the flow of funds. The Wisconsin court likened the program to *Witters*, reasoning that it was parents, not government, that made the decisions, and thus the flow of funds to any sectarian school was not an action by the state and thus did not offend the Establishment Clause. But this formulation, though simple, lacks intellectual rigor. By focusing on the individual choices of individual parents, it side-steps the Supreme Court's criteria of whether the effect of the law was to advance religion. It fails to account for the effect of the program as a whole, either on religious schools, the public schools, or taxpayers. The lack of state action -- indirection or attenuation, as phrased by the court -- can also be seen as a form of not-so-sophisticated money laundering. Do tax dollars lose their public character (and hence their public obligations) merely by being laundered through the parent's choices?

Direct/indirect Payments - A metaphysician's dream, the determination of when aid is "direct" or "indirect" is a question easily answered at the margins, but far more difficult in practice. The Vermont and Maine cases, in particular, beg the question as to whether the inquiry even matters. In both states, tuition dollars would be paid directly. The plaintiffs assume, and then argue, that indirect payments already pass muster and, thus, direct payment to religious schools are therefore permissable. If the key questions are neutrality, or effect, or some combination of such factors, then the manner of payment is legally irrelevant and money should flow directly. In shifting the loci of the debate, entanglement, purpose and effect are not addressed (or presumed to be permissable) in this line of reasoning.

Effect - The most discussed prong of the *Lemon* test in all except the most recent cases, the primary (or substantial) effect of the program is what now seems to be most ignored. Although studying effects over time might be required and lines will sometimes be hard to draw, it is nevertheless essential to ask the question: Does this program of public funding, immediately or over time, have the substantial effect of helping to promote religious education or religious institutions? This question is never really contemplated in the Wisconsin or Arizona cases. To the extent it is asked, it would appear that the

state supreme courts are not concerned with the answer. The question is asked and answered in the Ohio case and provided the fundamental rationale for striking down the Ohio scholarship program.

A Question of Perspective - This is an issue not yet well recognized or articulated by the courts. Under many state constitutional provisions, taxpayers have a right not to be compelled to contribute to the support of religious institutions. In many cases, the state constitutional language is far more explicit than the federal Establishment Clause. The problem must be viewed not simply as a matter of parental choice (neutrality, indirection), but also from the perspective of taxpayers. For it is all taxpayers, not just parents, who would be forced to contribute to the religious education of individuals "contrary to the dictates of conscience". Vt. Const. Ch.I, Art. 3.

If we take the issue of effect seriously, however, even the Federal Constitution forces us to ponder the question of perspective. Effect to whom, when, and how is it measured? Given that the literal language of the Establishment Clause and its history is most concerned with public financial support of religious institutions, the effect on taxpayers, the body politic and the public treasury are essential. Madison's *Memorial and Remonstrance Against Religious Assessments* makes the case plainly (see Appendix to *Everson*).

But effect can be difficult to measure, and predictions of the future impossible to prove. The Vermont trial court's decision (quoted above) predicts widespread deleterious effects of public funding. Whether we agree or disagree, it must be recognized as prognostication, not fact. Perhaps even more problematic are the scylla and charybdis of the Establishment Clause, on the one hand, and the Free Exercise (of religion) Clause, on the other. The courts recognize the deeply embedded history of religion in America including such seemingly incongruent practices as opening prayers in many state legislatures, held permissible in Marsh v. Chambers, 463 U.S. 783 (1983), in congress, and even at the Supreme Court ("God bless this Honorable Court"). Thus it is with fear and trembling that the courts approach the "wall of separation" between church and state and find that it is, at best, a "blurred, indistinct and variable barrier".

Despite these difficulties, proper attention to the issues of effect and perspective should help courts avoid lapsing into a simpler, but ultimately unsatisfying emphasis on mere neutrality and indirection. Courts must review any program purporting to supply public funding to religious institutions, by any means, and determine what the program's long-range effect will be. And courts must look to Establishment Clause history and specific state constitution provisions to determine whether any proposal runs aground of the prohibition against compelled taxpayer support of religious institutions. These questions may be more difficult to answer, but the answers are essential.

Conclusion

Questions regarding the roles of church and state are as old as religion and government themselves. For the greatest part of human history, religion and government have been inextricably intertangled and supportive of each

other's ends. With the rise of democracies, and mindful of a history of religio-government violations of human rights, separation of church and state was clearly enunciated in the Constitution and clarified in subsequent court interpretations. In the Everson decision, the court notes that people who have lived their lives free of religious persecutions, and free of corrosive entanglements of church, school and government have become insensitive to the dangers to democracy and to human rights that were represented in earlier eras.

The school privatization movement, which subsumes that education is an individually chosen market commodity rather than an essential and common requirement for a democratic society, asks for each person to act in their self-interests rather than in the common interests. The philosophical presumption and social theory in this thinking is that the good of the whole will be served by a collection of libertarian independent decisions.

The historical church-state conflict merges with the contemporary educational voucher movement as they converge into a third stream of court cases and judicial history. It is only in the last half century that the practice of religion has been removed from schools despite the long-standing First Amendment establishment clause. Whether recent court decisions are seen as an erosion of hard-won separation gains, needed corrections of errant courts, or simply as the gradual and necessary evolution and finer specificity of legal boundaries in a complex area is in the eye of the beholder.

Certainly, the balance between the three prongs of the *Lemon* test and the ways in which they are applied are in flux. The interpretation of the secular purpose prong seems to be in decline, excessive entanglement is neglected while contemporaneous debate sees neutrality and indirection in the ascendancy.

Often obscured by what often seem to be the finest of legalistic distinctions are great and fundamental philsophical and values questions. Both sides lay claim to the moral high ground in redefining society and education.

The Council of Bishops invested millions of dollars in the religious voucher movement in order to gain governmental subsidies for religious education. The February, 1999 meeting of the National Catholic Educational Association titled their conference, "Catholic Schools and School Choice: Partners for Justice." Portraying themselves as ensuring that poor and inner-city children receive a quality education through full funding of religious schools, they present their arguments as moral imperatives (Archer, 1998).

Embracing exactly the opposite point of view, Americans United for the Separation of Church and State and similar organizations bring forth a massive body of scientific literature that shows such programs result in religious and social division in nations, provide no academic benefits, and end up increasing costs for education. Addressing the moral issue from another perspective, and citing sectarian wars around the globe, any act by government that would separate children and peoples by religious groupings is detrimental to the good of democracy and society as a whole.

While presented in the appealing language of "choice," religious freedom, and escape from vague unsubstantiated failures of public schools[4], religious voucher schemes raise fundamentally and often unexamined questions about the nature and purpose of education in a democratic society. The vital questions wrapped in these legal and political questions include whether education is for the common good as contrasted with the individual good, the nature of class and social structure in the United States, whether government will directly or indirectly support religion, whether the daily practice of education will be conducted by elected citizens, and the nature of the values taught to our children. The complexion of all these issues will be determined by the court cases and by legislative activities in statehouses and in Washington.

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[4] Belying these claims, SAT scores are at a 28 year high, commerical tests have been renormed upwards, and high school completion and tertiary continuation rates are at an all time high.

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